

FILED

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U.S. DISTRICT COURT**

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CASE NUMBER 1:03CV01756

JUDGE: Rosemary M. Collyer

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 08/18/2003

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THOMAS BOYES, 4772 Big Draw Drive, North Las
Vegas, Nevada, 89031,

Plaintiff,

v.

U.S. DEPARTMENT OF ENERGY, 1000
Independence Ave., SW, Washington, DC 20585,

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

FREEDOM OF INFORMATION ACT
ADMINISTRATIVE PROCEDURE ACT

Plaintiff, Thomas Boyes alleges as follows :

INTRODUCTION

1.

This action is premised upon violations of both the Freedom of Information Act, 5 U.S.C. § 552 et. seq. (FOIA), and the Administrative Procedure Act, 5 U.S.C. § 701 et. seq. (APA). It challenges the unlawful failure of Defendant, Department of Energy (DOE) to respond to Plaintiff's FOIA request in the manner mandated by FOIA. The DOE is withholding documents from Plaintiff Thomas Boyes to which he is entitled. Moreover, Defendant failed to timely respond to Plaintiff's FOIA

1 appeal. Moreover, Defendant failed to comply with the statutory mandates and deadlines imposed by
2 FOIA by virtue of its failure to provide a final determination responding to Plaintiff's FOIA request in
3 the manner and within the time required by law. Plaintiff seeks declaratory relief that Defendant has
4 violated the FOIA and APA. Plaintiff also seeks injunctive relief directing Defendant to promptly
5 provide it with copies of the requested materials.

6 7 **JURISDICTION, VENUE AND BASIS FOR RELIEF**

8 2.

9 This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.
10 § 1331.

11 3.

12 Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue
13 for FOIA cases in this district.

14 4.

15 Declaratory relief is appropriate under 28 U.S.C. § 2201.

16 5.

17 Injunctive relief is appropriate under 28 U.S.C. § 2202.

18 19 **PARTIES**

20 6.

21 Plaintiff Thomas Boyes is a resident of Las Vegas, Nevada. In October, 2002 he
22 submitted a request for documents to the Department of Energy. The request was denied in part and
23 granted in part. Mr. Boyes, then timely appealed the portion of his request which had been denied.
24 Ultimately, the denial was upheld on appeal.

25 7.

26 Defendant, Department of Energy (DOE), is an agency of the executive branch of the United
27 States government, it is in possession and control of the records sought by Plaintiff, and as such, it is
28 subject to the FOIA pursuant to 5 U.S.C. § 552(e).

STATEMENT OF OPERATIVE FACTS

8.

On October 23, 2002, Plaintiff submitted a FOIA request to the Golden Field Office (GFO) of the DOE seeking "a copy of the grant awarded to the General Electric Company, i.e. (Contract DE-FC36-02GO11100) . . . All relevant materials related to this contract in it's (sic) entirety."

9.

By letter dated November 25, 2002, DOE responded to Plaintiff's request by indicating that it had identified four documents which it deemed to be responsive to Mr. Boyes' request for information. However, Defendant withheld the vast majority of the responsive materials, stating that "We withheld the following documents in their entirety:

- Except for the title pages, the entire 30-page technical application, Volume I entitled "The Design and Development of a 100 MVA HTS Generator for Commercial Entry", dated May 15, 2001
- Except for title pages, the entire 22-page business application, Volume II of the same title and date
- A five page DOE analysis of General Electric Company's cost and rate structure under this cooperative agreement

At that time, DOE invoked FOIA's exemption 4, 5 U.S.C. § 552(b)(4), which generally prevents disclosure of "protected commercial and financial information" as the basis for its decision.

10.

Additionally, Defendant withheld a one-page letter from DOE to General Electric invoking FOIA's exemption 5, 5 U.S.C. § 552(b)(5), which generally prevents disclosure of intra-agency documents which contain predecisional information.

11.

The FOIA mandates that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b).

12.

On December 20, 2002, DOE received Plaintiff's timely filed administrative appeal of Defendant's denial of his FOIA request.

///

13.

In January of 2003, the twenty working day response deadline imposed by the FOIA, see 5 U.S.C. § 552(a)(6)(A)(ii), elapsed with no response from Defendant. Defendant did not assert any unusual or exceptional circumstances which may have prevented its compliance with this statutory deadline.

14.

By letter dated March 10, 2003, Defendant finally replied to Plaintiff's appeal. The DOE's review indicated that Defendant's initial response was too "conclusory" in the manner by which it described the basis for the denial and therefore DOE "remanded" the matter back to the GFO in order to issue a "new determination" responsive to Plaintiff's FOIA request. DOE's March 10, 2003 letter did not contain any information informing Mr. Boyes of his right to seek judicial review of the decision as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

15.

The FOIA does not contain any provision which allows an administrative appeal to be "remanded" to another office of an agency receiving a document request. The FOIA requires that an agency issue a conclusive "determination" of the appeal within 20 working days of receipt. 5 U.S.C. § 552(a)(6)(A)(ii).

16.

Upon "remand" the GFO issued a letter dated May 7, 2003 in which it reiterated its decision to withhold the documents at issue herein. The GFO's May 7, 2003 letter also did not contain any information informing Mr. Boyes of his right to seek judicial review of the decision as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i).

17.

Plaintiff has fully exhausted all administrative remedies required by FOIA. 5 U.S.C. §§ 552 (a)(6)(A), (a)(6)(C).

18.

Plaintiff has been required to expend costs and to obtain the services of a law firm, consisting of attorneys, law clerks, and legal assistants, to prosecute this action.

CAUSES OF ACTION

COUNT I
VIOLATION OF THE FREEDOM OF INFORMATION ACT

19.

The allegations made in paragraphs 1 through 18 are realleged and incorporated by reference herein.

20.

Plaintiff has a statutory right to review the requested materials and there is no legal basis for Defendant's refusal to disclose these documents or portions of these documents. Additionally, Defendant cannot lawfully refuse to provide access to otherwise non-exempt portions of documents which are "reasonably segregable" merely because it asserts a disclosure exemption for other portions of such documents.

21.

Plaintiff has a statutory right to have Defendant process his FOIA request and appeal in a manner which complies with FOIA. Plaintiff's rights in this regard were violated when the DOE unlawfully delayed its response to his appeal and then "remanded" the matter back to the GFO without notifying him of his right to seek judicial review. The GFO further compounded this deficiency when its letter of May 7, 2003 also failed to notify Plaintiff of his appeal and judicial review rights.

22.

Unless enjoined by this Court, Defendant will continue to violate the rights of Plaintiff to receive public records under the FOIA.

23.

Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA. 5 U.S.C. § 552(a)(4)(E).

COUNT II
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

24.

The allegations made in paragraphs 1 through 23 are realleged and incorporated herein by reference.

25.

Defendant has failed to act in an official capacity under color of legal authority by failing to comply with the mandates of FOIA consequent to its refusal to disclose the documents requested by Plaintiff.

26.

Defendant has unlawfully withheld agency action by failing to comply with the mandates of FOIA consequent to its refusal to disclose the documents requested by Plaintiff.

27.

Plaintiff has been adversely affected and aggrieved by the Defendant's failure to comply with the mandates of FOIA. Defendant's refusal to disclose the documents requested by Plaintiff have injured Plaintiff's interests in public oversight of governmental operations and constitute violation of Defendant's statutory duties under the APA.

28.

Plaintiff has suffered a legal wrong as a result of the Defendant's failure to comply with the mandates of FOIA. Defendant's refusal to disclose the documents requested by Plaintiff have injured Plaintiff's interests in public oversight of governmental operations and constitute violation of Defendant's statutory duties under the APA.

29.

Defendant's actions in failing to disclose the documents requested by Plaintiff is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law.

30.

Plaintiff is entitled to judicial review under the Administrative Procedure Act 5 U.S.C.S. §§702, 706.

31.

Plaintiff is entitled to costs of disbursements and costs of litigation, including reasonable attorney and expert witness fees, under the Equal Access to Justice Act, 28 U.S.C.S. § 2412.


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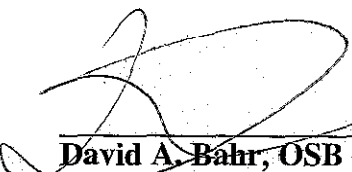
REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant to promptly provide Plaintiff with copies of the requested documents which remain at issue in this action.
2. Declare the Defendant DOE's refusal and failure to disclose the documents requested by Plaintiff and its unlawful processing of Plaintiff's document request and appeal to be unlawful under the FOIA and the DOE's implementing regulations.
3. Declare the Defendant DOE's refusal and failure to disclose the documents requested by Plaintiff and its unlawful processing of Plaintiff's document request and appeal to be arbitrary, capricious, an abuse of discretion, and not in accordance with law under the APA.
4. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.
5. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted for the Court's consideration, this date, August 13, 2003.


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* Motion for Admission *Pro Hac Vice* Pending